IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.3180 OF 2004
WITH
WRIT PETITION NO.2466 OF 2004

Hamid Surabhai Sama. ...Petitioner.
Vs.
Smt. Prabhavati Nanalal Vakharia. ...Respondent.

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Mr. V.Y. Sanglikar for the Petitioner.
Mr. V. T. Walawalkar with Mr. Sameer R. Bhalekar for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.

July 10, 2006.

P.C.

The suit for a declaration of tenancy, filed by the tenant, was dismissed by the Trial Court and the order of dismissal has been affirmed in appeal by the Appellate Bench of the Court of Small Causes. Correspondingly, the suit for eviction was decreed and that decree has been confirmed in appeal. The orders passed in the declaratory suit and in the suit for eviction have been questioned in these proceedings under Article 227 of the Constitution.

2. The Petitioner came to occupy the premises under a Leave and Licence Agreement dated 23rd April 1971. The term of the licence was from 1st May 1971 to 30th April 1972. Thereafter, a fresh licence agreement was entered into on 17th July 1972 for the period between July 1972 and June 1973. On 15th December 1972, a notice of termination was issued on the ground that the compensation for the months of November and December 1972 had not been paid; that the electricity charges between August and November 1972 were in arrears and that certain changes had been carried out without the permission of the landlord. The notice provided an opportunity to the Petitioner to clear the dues, failing which the agreement was to stand terminated. Admittedly the compensation that was in arrears was not paid. The Licence agreement, therefore, stood terminated.

3. Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, provides that where any person is on the **first day of February 1973** in occupation of any premises, or any part thereof which is not less than a room as a licensee, he

shall be deemed to have become the tenant of the landlord in respect of the premises in his occupation. It is a settled position of law that there had to be a subsisting licence as on 1st February 1973 in order that the deeming fiction provided by Section 15A(1) should come into operation. In the present case, there was a valid termination of the licence, before 1st February 1973. Hence, there was no question of the licence subsisting on 1st February 1973. In the circumstances, there is no merit in the submission that the licence of the Petitioner had by the deeming fiction enacted by Section 15A fructified into a tenancy.

4. The next submission which has been urged is that even after the termination of the licence, the landlord continued to accept the rent and therefore, there has been a waiver of the notice to quit. Now, the question as to whether a notice to quit stands waived by subsequent conduct is a mixed question of law and fact. Counsel appearing on behalf of the Petitioner has been unable to demonstrate on the basis of either the pleadings or the evidence led before the Court below that such a point was specifically taken.

Counsel appearing on behalf of the Petitioner relied on a receipt dated 11th January 1973 and submitted that it would appear that the compensation has been accepted even after the notice of termination. The Trial Judge noted in para 21 of the judgment that the subsequent payments were accepted without prejudice. Moreover, the receipt dated 11th January 1973 is for the arrears of compensation for the period between 1st November 1972 and 30th November 1972 which is a period prior to the notice of termination. That cannot be regarded as a waiver of notice to quit. That apart, it was necessary for the Petitioner to specifically take a specific plea in the pleadings that there was by subsequent conduct a waiver of the notice to quit and to substantiate the plea by evidence. That has not been done. There is, therefore, no merit in the submission.

5. The Appellate Bench of the Court of Small Causes has in the course of its judgment noted that it was contended by the Petitioner that though the agreement dated 17th July 1972 was styled as a Leave and Licence Agreement, it was in substance an

agreement of lease. The Appellate Bench has recorded that the Petitioner suppressed the fact that there was an earlier agreement of 22nd April 1971. That agreement again was an agreement of licence. There was a material suppression of facts by the Petitioner.

6. In sum and substance, therefore, the Petitioner was not in occupation under a subsisting licence as on 1st February 1973. Inasmuch as the licence had been terminated on 15th December 1972, the licence was not subsisting on 1st February 1973. The Petitioner, therefore, is not entitled to the benefit of Section 15A. There is absolutely no evidence to substantiate a plea of a waiver of the notice to quit. No case for interference under Article 227 of the Constitution is made out. The petition is dismissed.

7. In order to enable the Petitioner to have recourse to his remedies in appeal there shall, on the oral request of Counsel for the Petitioner, be a direction to the effect that the decree of eviction shall not be executed for a period of eight weeks from

today subject to the filing of the usual undertaking by the Petitioner within a period of two weeks in this Court.

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